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In The

Supreme Court of the United States

October Term, 1992

JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee, and CHARLES W. BURSON, in his capacity as Attorney General of the State of Tennessee,

Petitioners,

v.

BLOOMINGDALE'S BY MAIL LTD.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

REPLY TO MEMORANDUM IN OPPOSITION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 3

I. THE TENNESSEE COURT MISCONSTRUED *HOWLETT* AND MISAPPLIED ITS GUIDING PRINCIPLE THAT A STATE COURT MUST APPLY §1983 TO PRODUCE THE SAME RESULT AS IF THE CASE HAD BEEN BROUGHT IN FEDERAL COURT 3

II. CONFLICTING DECISIONS OF STATE HIGH COURTS ARE NUMEROUS AND CONTINUING AND WARRANT REVIEW OF THIS CASE BY THIS COURT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Allison v. Board of County Commissioners, 241 Kan. 266, 737 P.2d 6 (1987) 7

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 6

Boise Artesian Water Co. v. Boise City, 213 U.S. 276 (1909) 5

Dean v. State, 826 P.2d 1372 (Kan.), *cert. denied sub nom. Zarda v. Kansas*, ___ U.S. ___, 112 S. Ct. 2941 (1992) 6, 7

Dennis v. Higgins, 498 U.S. ___, 111 S. Ct. 865 (1991) 6

Dows v. Chicago, 11 Wall. (78 U.S.) 108 (1871) 5

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) 4, 5

Felder v. Casey, 487 U.S. 131 (1988) 3, 4

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 5

Greenwich Township v. Murtagh, 601 A.2d 1352 (Pa. Commw. 1992) 8

Hafer v. Melo, 502 U.S. ___, 112 S. Ct. 358 (1991) 5

Hogan v. Musolf, 163 Wisc. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992) 6, 7

Howlett v. Rose, 496 U.S. 356 (1990) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page(s)

Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985) 7

Linderkamp v. Bismarck School District No. 1, 397 N.W.2d 76 (N.D. 1986) 7

Maine v. Thiboutot, 448 U.S. 1 (1980) 8

Martinez v. California, 444 U.S. 277 (1980) 8

Nutbrown v. Munn, 311 Ore. 328, 811 P.2d 131 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992) 6

Quill Corporation v. North Dakota, 504 U.S. ___, 112 S. Ct. 1904 (1992), *on remand*, ___ N.W.2d ___, 1993 WESTLAW 150414 (N.D. 1993) 6

Raschke v. Blancher, 141 Ill. App. 3d 813, 96 Ill. Dec. 711, 491 N.E.2d 1171 (1986) 7

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 4

Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386, *aff'd by an equally divided court*, 471 U.S. 82 (1985) 8

State v. Quill Corporation, ___ N.W.2d ___, 1993 WESTLAW 150414 (N.D. May 11, 1993) (*Quill II*) 1, 3, 4, 9

Stufflebaum v. Panethiere, 691 S.W.3d 271 (Mo. 1985) 7

Wilson v. Garcia, 471 U.S. 261 (1985) 3

Zizka v. Water Pollution Control Authority, 195 Conn. 682, 490 A.2d 509 (1985) 7

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES:

Federal:

28 U.S.C. §1341 4

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1988 ..... 2, 5, 8, 9

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REPLY TO MEMORANDUM IN OPPOSITION

INTRODUCTION

The memorandum in opposition to certiorari fails to diminish any of the compelling reasons for granting the writ initially set forth in the petition itself. Indeed, respondent Bloomingdale's By Mail Ltd. ("Bloomingdale's") admits that the decision of the Tennessee Supreme Court of which review is sought is in direct conflict with the decision of the Supreme Court of North Dakota in *State v. Quill Corporation*, ___ N.W.2d ___, 1993 WESTLAW 150414 (N.D. May 11, 1993) ("*Quill II*") (reprinted as Appendix J to Petition, App. 60-App. 78).

While Bloomingdale's naturally prefers the Court to review the *Quill* decision instead of the instant one (Memo in Opp. at 12), it is clear enough that the issue is one of significant national importance that is as yet unresolved, and that this Court should settle the issue presented in this case, and perhaps in *Quill* as well.

Bloomingdale's relies heavily on *Howlett v. Rose*, 496 U.S. 356 (1990), as authority for its position that state courts are obliged to maintain state tax cases under 42 U.S.C. §1983 and 42 U.S.C. §1988, even in the face of other plain and adequate state-created remedies that provide for protection of all federal rights. In doing so, respondents wrench *Howlett* far from its context and meaning. Courts at all levels have refused to view *Howlett* as necessarily dispositive of the issue presented here, and that decision certainly is not the sort of judicial watershed in this area that Bloomingdale's would have us believe. Several courts, in fact, have viewed *Howlett* as mitigating strongly in favor of the petitioners' position. See discussion at 7-8 *infra*. The contrary view of the Tennessee court in its decision here adds to the general confusion about the role of the civil rights statutes in state tax cases. Thus this case does indeed provide a timely and appropriate vehicle for determination of the applicability of §§1983 and 1988 in state tax matters.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE COURT MISCONSTRUED *HOWLETT* AND MISAPPLIED ITS GUIDING PRINCIPLE THAT A STATE COURT MUST APPLY §1983 TO PRODUCE THE SAME RESULT AS IF THE CASE HAD BEEN BROUGHT IN FEDERAL COURT.

The teaching of *Howlett* is that state courts, in hearing §1983 claims, must adjudicate them as fully and effectively as would the federal courts. This Court precisely stated the question presented in *Howlett* as follows:

> The question in this case is whether a state-law defense of "sovereign immunity" is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.

496 U.S. at 358-59. The Court concluded that since sovereign immunity would not have been available as a defense in federal court had plaintiff chosen to bring suit in that forum, then neither was it available in state court. "[T]he point the Court is making is that the Supremacy Clause precludes state courts from applying state procedural rules that would necessarily produce a different result than if the case had been brought in federal court." *State v. Quill Corp.*, ___ N.W. 2d ___, 1993 WESTLAW 150414 at *4 (Appendix J at App. 68). This is consistent with this Court's emphasis on "intrastate uniformity," that is, the intent of Congress that §1983 be applied uniformly in each state, whether suit is brought in federal or state court. *Felder v. Casey*, 487 U.S. 131 (1988); *Wilson v. Garcia*, 471 U.S. 261 (1985).

Obviously, "[t]he federal interest in intrastate uniformity does not require recognition of a §1983 claim in a state court when it would not be recognized in a federal court." *Quill*, 1993 WESTLAW 150414 at *5, Appendix J at App. 70. In *Howlett*, the federal courts had unquestioned jurisdiction over the §1983 claim, so Florida courts had to treat that claim in the same way. In contrast, in a state tax case where there is a plain, speedy, and efficient remedy under state procedures, federal courts have no jurisdiction over a §1983 claim because of the Tax Injunction Act, 28 U.S.C. §1341, and neither are the state courts required to hear such a claim.

Thus in the spirit of *Howlett* and *Felder*, intrastate uniformity is *promoted* by the refusal of state courts to entertain tax cases under §1983. This further complements the design of Congress through the Tax Injunction Act to relegate state taxpayers to state courts, pursuant to state remedies. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981), Petition at 14-15.

Thus *Howlett* supports the petitioners' position, not Bloomingdale's, because it illustrates the importance of intrastate uniformity in §1983 proceedings. *Howlett* was not a tax case, but one involving search and seizure of a high school student's car. It did not involve the state at all, but merely county school officials who were clearly subject to §1983 claims. Since its decision did not concern taxes, the Court in *Howlett* had no occasion to address the specific application of intrastate uniformity in the context of state taxation, or to discuss the special concerns of state fiscal integrity that are reflected in the Tax Injunction Act, the constitutional structure of federalism, and many decisions of this Court. *See Rosewell v. LaSalle*

National Bank, 450 U.S. 503 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276 (1909); *Dows v. Chicago*, 11 Wall. (78 U.S.) 108 (1871).

The larger issue, not specifically addressed in *Howlett*, is whether §1983 provides a remedy in state tax cases at all, where the state has designed and provided another plain, speedy, and efficient remedy that fits into the general administration of state taxes and protects all substantive federal rights. Petitioners contend that such a limitation on the scope of §1983 exists concerning state taxation, because of the interplay of the Tax Injunction Act and the constitutional power of each sovereign state under our federal system to structure its own fiscal affairs. *Hafer v. Melo*, 502 U.S. ___, 112 S. Ct. 358 (1991); *Fair Assessment*, 454 U.S. 100. To the extent it applies, the reasoning in *Howlett* and its demonstration of the doctrine of intrastate uniformity support the petitioners' position.

II. CONFLICTING DECISIONS OF STATE HIGH COURTS ARE NUMEROUS AND CONTINUING AND WARRANT REVIEW OF THIS CASE BY THIS COURT.

Contrary to respondent's contention, the state courts are in continuing and increasing conflict about their obligation to maintain state tax cases under §§1983 and 1988. This is best illustrated by the two most recent state supreme court decisions, those from Tennessee and North Dakota, which even respondent concedes are in direct

and irreconcilable conflict. This conflict is the more exacerbated because both of these cases involved use taxes on goods sold by out-of-state companies through means of interstate commerce, and both were controlled on the merits by this Court's decision in *Quill Corporation v. North Dakota*, 504 U.S. ___, 112 S.Ct. 1904 (1992). The diametrically opposed decisions of the Tennessee and North Dakota courts on the identical issue of whether federal law requires an award of attorneys' fees under §1988 call for definitive resolution by this Court.

Bloomingdale's contends that *Howlett* has already clarified the law in this area, but the courts, including this Court, have failed to recognize any such clarification. In *Dennis v. Higgins*, 498 U.S. ___, 111 S. Ct. 865 (1991), which post-dates *Howlett*, the dissent notes that the decision that the Commerce Clause guarantees personal, judicially-cognizable rights renders of "paramount importance" the *unresolved* question of whether state courts must entertain tax claims under §1983. 111 S.Ct. at 880 (Kennedy, J., dissenting). This echoes the specific reservation of the instant question in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), a reservation that this Court has yet to address.

Beside the Tennessee decision below, other state decisions that post-date *Howlett* have not found that case dispositive of the instant issue. In *Hogan v. Musolf*, 163 Wisc. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992), *Nutbrown v. Munn*, 311 Ore. 328, 811 P.2d 131 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 867 (1992), and *Dean v. State*, 826 P.2d 1372 (Kan.), *cert. denied sub nom. Zarda v. Kansas*, ___ U.S. ___, 112 S. Ct. 2941 (1992), those state supreme courts refused to entertain

§1983 claims in tax cases where there were plain, speedy, and efficient remedies under state law. While these cases speak in terms of exhaustion of state remedies, they make it clear that their state remedies are adequate and complete and do not contemplate a future award of attorneys' fees. The court in *Hogan* specifically cites and follows *Linderkamp v. Bismarck School District No. 1*, 397 N.W.2d 76 (N.D. 1986), *Stufflebaum v. Panethiere*, 691 S.W.3d 271 (Mo. 1985), and *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985), three of the state supreme court decisions that respondent now attempts to ignore.

Similarly, the Kansas court in *Dean v. State*, 826 P.2d 1372 (Kan.), *cert. denied sub nom. Zarda v. Kansas*, ___ U.S. ___, 112 S. Ct. 2941 (1992), relied on *Stufflebaum* and the similar appellate court decisions in *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985), and *Raschke v. Blancher*, 141 Ill. App. 3d 813, 96 Ill. Dec. 711, 491 N.E.2d 1171 (1986), to hold that "[t]he considerations that have prompted federal court restraint in matters of state taxation also should prompt restraint where a federal cause of action is brought in state court challenging matters of state taxation." 826 P.2d at 1378. In so holding, the Kansas Court departed from its previous pre-*Howlett* decision that allowed an award of §1988 fees in a state tax case. *Allison v. Board of County Commissioners*, 241 Kan. 266, 737 P.2d 6 (1987). Thus, instead of undermining the decisions on which petitioners rely, *Howlett* has left undisturbed, or even strengthened, many jurisdictions in refusing to allow for a §1983 remedy in state tax cases.

Similarly, in *Greenwich Township v. Murtagh*, 601 A.2d 1352 (Pa. Commw. 1992), the Pennsylvania court analyzed *Howlett* as "attempting to assure that the outcome of federal causes of actions would be the same, regardless if decided in a state or federal forum." 601 A.2d at 1355. It concluded that "[s]ince federal courts decline to exercise jurisdiction because federal intrusion in state tax schemes is unwarranted," state courts also should not interfere because their enforcement of tax claims through §1983 would be "no less intrusive or disruptive than if enforced by a federal court." 601 A.2d at 1356. Thus the Pennsylvania court also viewed *Howlett* as supporting the doctrine of intrastate uniformity and the refusal of state courts to hear tax cases under §1983.

Respondent attempts to diminish the impact of the holding and affirmance of *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386, *aff'd by an equally divided court*, 471 U.S. 82 (1985), in which South Carolina refused to maintain a §1983 claim in a state tax case, by characterizing it as premised on the failure of this Court to rule that state courts must hear §1983 actions. (Memo. in Opp. at 10). Respondent contends that that question was answered in *Howlett*. Respondent ignores, however, that *Howlett* expressly declined to rule on whether states need establish courts competent to entertain §1983 claims, 110 S.Ct. at 2444 n.20, citing the same two cases (*Maine v. Thiboutot*, 448 U.S. 1 (1980) and *Martinez v. California*, 444 U.S. 277 (1980)) that the *Spencer* court cited. Thus nothing in *Howlett* undermines *Spencer* or any of the other state cases refusing to maintain tax claims under §§1983 and 1988.

Thus, since *Howlett* was decided, no state high court except Tennessee's has thought that case dispositive of the instant issue. The states' courts at the highest and intermediate levels continue to differ in their approaches to §1983 litigation in tax cases, and some have viewed *Howlett*, because of its emphasis on intrastate uniformity, as strengthening the position that tax cases cannot be maintained under §§1983 and 1988 in federal or *state* courts. The Tennessee decision conflicts not only with that of the North Dakota court in *Quill II*, but with at least four other state high courts. These conflicts show no evidence of subsiding, but remain pervasive and fundamental. Only a decision of this Court can resolve these conflicts and restore uniformity in the application of §§1983 and 1988 and the adjudication of state tax cases.

CONCLUSION

For the foregoing reasons and those presented in the original petition, petitioners request that the petition be granted and that a writ of certiorari issue to review the decision of the Supreme Court of Tennessee.

Respectfully submitted,

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